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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID GANTT, *et al.*,

Appellants,

—v.—

DEAN SKELOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEES' MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF THE TRIAL COURT

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Appellees Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) and Evelyn Corchado, plaintiffs in Puerto Rican Legal Defense and Education Fund, Inc., et al. v. Gantt, et al., Civil Action No. 92-1521 (SJ) (E.D.N.Y.) (hereinafter PRLDEF plaintiffs or Appellees), move the Court to dismiss the appeal herein or, in the alternative, affirm the unanimous judgment of the United States District Court for the Eastern District of New York on the ground that the questions presented are so insubstantial as not to need further argument.

I.

PRELIMINARY STATEMENT

At the time of the filing of this appeal, at issue was the power of a three-judge federal court to enjoin a parallel

State court proceeding when both courts would potentially engage in the process of redrawing New York State's congressional districts. Circumstances have changed since that time that make this case an inappropriate vehicle to address this issue. On June 11, 1992, the Governor of New York signed a congressional redistricting plan passed by the New York State Legislature. The Governor's action effectively moots the State court proceeding. Plaintiffs in the State court proceeding challenged the current districts solely on the grounds that the current districts failed to meet the one-person, one-vote requirements. Because the newly adopted plan complies with one-person, one-vote requirements, these claims are extinguished and the case is moot. Thus, the conflict originally presented by the injunction issued below

no longer exists: The State court proceedings have been effectively closed.

For the reasons stated below, even if the State court proceedings were not moot, the Court should dismiss appellant's appeal, or affirm the order of the district court.

II.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

A. Background

In early 1991, 1990 census data reflecting demographic changes in the United States and in New York State was made available. There was no dispute that New York's congressional districts had to be redrawn. New York State's population had grown at a rate relatively slower than other states. Consequently, New York State was required to reduce its number of congressional seats from 34 to

31. Yet, at the inception of this litigation at the end of March, 1992, the Legislature had not acted to redraw the State's congressional districts. It had not complied with its own redistricting schedule, which had been adjusted at least four times, each time delaying the date for recommendation of a statewide redistricting plan. An apparent legislative impasse had been reached.

Yet, on June 9, 1992, the candidate petitioning process for congressional seats was scheduled by statute to begin. Reasonable time for the State actors to adopt a reapportionment plan had expired.

B. The Proceedings Below

On March 26, 1992, as a consequence of the Legislature's inaction and the impending candidate qualification period, actions were filed in both State and

federal court. The State court action, Reid et al. v. Marino, et al., No. 9567-92, was filed in the Supreme Court of New York for the County of Kings by eight individuals who are alleged to be residents and voters in Kings County, New York, plus seven incumbent Members of the U.S. House of Representatives. The federal action, Waring v. Gantt, et al., No. 92 CV-6134-T, was filed in the United States District Court for the Western District of New York by an alleged resident and voter of New York State's 32nd Congressional District.

A third action PRLDEF v. Gantt was filed on March 31, 1992. At the same time PRLDEF plaintiffs moved by order to show cause for a preliminary injunction. Until that day, no party in either the Waring or Reid actions had sought any injunctive relief. On March 31, 1992, the State

court plaintiffs in Reid (hereinafter State court plaintiffs or Appellants) also sought injunctive relief pursuant to an order to show cause.

PRLDEF plaintiffs, and only PRLDEF plaintiffs, alleged that the New York's existing congressional map denied Latino voters their right to vote in violation of the Voting Rights Act of 1965, as amended, and the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. PRLDEF Complaint, at paragraphs 52 and 53 (hereinafter Pl. Comp.).

They, more specifically, alleged that New York State's existing congressional districts diluted Latino voting strength in violation of section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Under the "totality of circumstances" test of section 2, all the elements were present

to establish a section 2 violation. As a remedy for such violation, PRLDEF plaintiffs sought congressional districts in which Latino voters would have an equal opportunity to elect representatives of their choice. Id. at pars. 36-44, 51.

Thus, PRLDEF plaintiffs' claims reflected the unquestioned federal interest of protecting the voting rights of Latino citizens. No other party to any of the pending actions was similarly asserting those interests when PRLDEF plaintiffs filed their action on March 31, 1992.

Neither the Reid or Waring plaintiffs alleged any violation of the Voting Rights Act, nor did they claim that the voting rights of Latino citizens of New York State were violated by the retention of the State's existing Congressional districting scheme and the failure of the

Legislature to create new Latino districts.

On April 1, 1992, an order to show cause was signed by the United States District Court for the Eastern District of New York setting a hearing on PRLDEF plaintiffs' motion on April 7, 1992.

On that date, the three judge panel of the United States District Court for the Eastern District of New York entered an order directing the parties to submit their recommendations for congressional redistricting plans by April 27, 1992, allowing other interested parties to intervene and submit their own plans by May 4, 1992, and denying any motion for abstention, to the extent raised. The panel entered no injunction against the New York State Legislature prohibiting it from creating a congressional redistricting plan. To the contrary, the

Court chose to not even set a date certain by which the Legislature was required to act. On April 9, 1992 a three judge panel of the United States district court for the Western District of New York transferred the Waring action to the Eastern District of New York, where it was consolidated with the PRLDEF action.

Meanwhile, in the State court proceeding, the New York State Senate (hereinafter Senate Defendants), on April 7, 1992, filed a notice removing the State court action to federal court. However, on April 17, 1992, the federal court granted the State Court plaintiffs' remand motion.

Unsuccessful in their removal of the State proceedings, the Senate Defendants moved to enjoin the State Court proceedings. A cross motion was filed by defendants Gantt, the New York State

Legislative Task Force on Demographic Research and Reapportionment, Weprin, and the Assembly of the State of New York (hereinafter Assembly Defendants or Appellants) who moved to dismiss, or alternatively to stay the PRLDEF proceedings on grounds of abstention.

C. DECISION BELOW

On May 5, 1992, the three judge panel unanimously denied the motion to dismiss or abstain, and unanimously granted the motion to enjoin the State court proceedings. It held because of exigent circumstances and the potential harm to plaintiffs' voting rights which would result from the further delay attendant in State court proceedings, it would not abstain. The district court, relying on Harman v. Forssenius, 380 U.S. 537 (1965), stated:

Here, we are faced with even more compelling reasons not to abstain. As in Harman, there are no disputed questions of state law at issue, and the case involves the same fundamental deprivation involved in the Harman case - the denial of the constitutional and statutory right to vote in the election of federal congressional representatives. Moreover, this motion comes under more stringent time constraints than did Harman: approximately one month before the beginning of the signature-gathering processes mandated by New York law, roughly five months before the primary election, and six months before the 1992 general elections.

Furthermore, adjudicating this dispute in state court increases the likelihood of delay. A decision by the state supreme court would be appealable to the supreme court's appellate division, then to the New York Court of Appeals, and only then to the United States Supreme Court. Under 28 U.S.C. § 1253, however, any order of this three-judge court which grants or denies injunctive relief would be appealable directly to the United States Supreme court.

Finally, we note that the recent cases cited by the Assembly defendants, e.g., Members of the Calif. Democratic Cong. Delegation v. Eu, _____ F. Supp. ____ (N.D. Cal. 1992), are inapposite, primarily because the federal courts that

abstained did so in favor of state redistricting process that had been substantially completed. In Eu, for instance, the California Supreme Court, exercising its original jurisdiction, had already issued a final judgment redistricting the entire state. See also, Cotlow v. Emison, 112 S. Ct. 855 (1992) (vacating order of three-judge district court enjoining state court proceeding's where state court was on eve of issuing final judgment and where case involved disputed questions of state constitutional law).

"Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote." Badham v. United States Dist. Court for the Northern Dist. of Cal., 721 F.2d 1170 (9th Cir 1983). In view of all of these considerations, we deny the motion to abstain in favor of the state proceeding.

[Slip Op. at 6-7].

In enjoining the State court proceedings, the Court without discussing the Anti-Injunction Act, but recognizing PRLDEF plaintiffs' federal constitutional

and Voting Rights Act claims, held that because there could only be one set of lines and two courts redistricting the State would be wasteful, as well as confusing, it would enjoin the State court proceedings. The Court stated:

> The three pending cases can ultimately result only in a single approved congressional redistricting plan for New York State. Consequently, these issues must be resolved in a single forum; two courts simultaneously attempting to redistrict the state would be wasteful, unnecessarily confusing, and inefficient. On this point, both the Senate defendants and Assembly defendants agree; they disagree, however, as to what forum should move ahead on the problem.
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> . . . .
>
> [I]n light of the .... reality that this dispute must be decided in one forum, we conclude that we must also exercise our power under the All Writs Act, 28 U.S.C. § 1651, to enjoin any further proceedings in the state court action. All of the claims presented in all three cases - PRLDEF, Waring, and Reid - are federal constitutional and Voting Rights Act claims involving the right to vote in an election for federal

> congressional representatives. Since we have a "virtually unflagging" obligation to decide federal claims, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976), we conclude that an injunction of the state redistricting case is both necessary and appropriate to protect our jurisdiction. United States v. International Bd. of Teamsters, 907 F.2d 277, 281 (2d Cir. 1990). The All Writs Act, of course, gives us the power to enjoin not only parties to the action before us, but nonparties as well. Id.

[Slip Op. at 4, 7-8].

This is the injunction which is now an appeal.

D. Actions Subsequent To The May 5, 1992 Order

By May 12, 1992, no congressional redistricting plan was passed by the New York State Legislature. Consequently, the district court entered an order on May 12, 1992 appointing a Special Master to undertake the reapportionment of New York State's 31 congressional districts.

On May 26, 1992, the Special Master submitted his plan to the court. That plan creates seven minority districts, three of which are Latino. Each of the Latino districts have voting age populations of 55% or greater and each is a viable districts.

In the State court Reid proceedings, only two Latino majority districts were created by the appointed State court referee in a plan released on June 1, 1992. In PRLDEF plaintiffs' view the State court plan violates sections 2 and 5 of the Voting Rights Act with respect to Latino voters.

On June 11, 1992, the Governor of New York signed a redistricting plan passed by the New York State Legislature, mooting the State court proceeding. On that same day, the federal court entered an order adopting and approving the Special

Master's plan and ordering that it be used for the 1992 congressional elections, if the State plan was not precleared by July 8, 1992.

III.

ARGUMENT

APPELLANTS RAISE NO SUBSTANTIAL ISSUES

Introduction

There are no substantial issues raised by this appeal. Appellants' argument is premised on the extraordinary and erroneous assertion that state courts, gua courts, have primacy over federal courts in the adjudication of, and choice of forum for, federal civil and voting rights claims. This is sheer nonsense.

The district court did not abuse its discretion when it rightly rejected appellants' abstention motion and entered

an injunction enjoining any further state court proceeding. Long standing precedent of this Court makes it clear the federal courts have primacy over state courts in adjudicating federal claims, especially civil rights claims. Once the district court appropriately refused to abstain, it had no choice but to enter an injunction to effectuate an appropriate remedy. Appellants concede that liability had been established with respect to one-person, one-vote claims; thus, the federal court's actions to draw congressional districts was the remedial stage of the litigation. Appellants also recognize in their jurisdictional statement that it is appropriate for a federal court to enjoin a State court proceeding in order to effectuate an appropriate remedy. There could only be one remedy, one set of new lines, and the federal court was the

appropriate court to provide this remedy for these violations of federal law.

At the heart of the appellants' appeal is their claim - that if one court is to be responsible for providing a remedy for legislature's inaction, it should be the State court. They argue that, even with only one month remaining before the start of the election process, the federal court should have abstained.

Appellants' argument is based on an erroneous premise. As an initial matter, the federal courts refusal to abstain is not appealable as an interlocutory order and is not now before this Court.[1] Equally important, as is demonstrated below, the district court's decision to exercise its primacy over the State court

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[1] See 17A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure, § 4243 (1977).

is in full accord with established precedent of this Court. First, this Court has consistently held federal courts, gua courts, have primacy over State courts in the adjudication of federal claims. Second, this Court and others have held that federal courts should not relinquish their jurisdiction and defer the adjudication of claims based on the fundamental rights to vote; where, as here, delay would have a potential impact on that fundamental right to vote. Third, Burford and Younger abstention did not apply here.

Thus, the abstention precedents of this Court fully support trial court's decision to retain jurisdiction and thus, provide relief. These decisions confirm the primacy of the federal court over state courts in resolving the federal claims presented here. Appellants'

assertion of the comity interest in having the State court provide a remedy for federal law violations is inconsistent with these precedents.

Having properly decided not to abstain, the federal court's decision to enjoin the State court proceedings under the All Writs Act was appropriate and fully within its discretion. The Court acted to protect the efficacy of the relief that it was providing for admitted violations of the United States Constitution.

Contrary to appellants' arguments, strong precedents of this Court support the district court's action. Their reliance on the Anti-Injunction Act is totally misplaced as this Court has held that the Act does not apply to constitutional claims.

A. PRLDEF PLAINTIFFS ARE ENTITLED TO THEIR CHOICE OF A FEDERAL FORUM

It is general principle of federal law that a plaintiff who properly invokes the jurisdiction of the federal court to adjudicate federal claims should not be divested of that jurisdiction. As this Court in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) explained:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal court is properly appealed to in a case over which it is its duty to take such jurisdiction.... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

> Willcox v. Consolidated Gas Co., 212 U.S. 19, 40, 53 L ed 382, 394, 29 S. Ct. 192, 48 LRA NS 1134.

375 U.S. at 415 (footnote omitted).

Here, PRLDEF plaintiffs had clearly asserted federal claims and were thus entitled to adjudicate their claims in federal court, unless there was a basis for the federal court to abstain.

"The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy before it." County of Allegheny v. Mashuda, 360 U.S. 185, 188 (1959); Moses H. Cone Hospital v. Mercury Constr., 460 U.S. 1, 14 (1983). Abdication of the obligation of the District Court to adjudicate the controversy properly before it "can be justified only in the exceptional

circumstance where the order to the parties to repair to the State court would clearly serve an important countervailing interest." Mashuda, 360 U.S. at 188-189. The "task in such cases is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that... justify the surrender of that jurisdiction." Moses H. Cone Hospital, 460 U.S. at 25-26 (emphasis in original). The fact that federal law provides the rule of decision on the merits is a factor that counsels against abstention. Id. at 23-26.

Here, the*re did not exist the "exceptional" circumstances and the "clearest of justifications" necessary to divest plaintiffs of their chosen federal

forum.

1. The State Court Has No Legislative Or Administrative Role In Redistricting And There Is No State Interest In Maintaining A State Forum To Adjudicate Federal Claims

Appellants argue strenuously that the New York State Supreme Court is a State agency with primacy over the federal court in fashioning redistricting plans. Jurisdictional Statement (hereinafter "Jur.") at 20. Unlike some State courts the New York courts play no administrative or legislative role in redistricting. They merely function as judicial tribunals. The only special deference given to State courts as a forum is where there are State law questions or where a federal courts' actions would interfere with a State court's actual judicial functions, such as, e.g., interfering with a State court's contempt order. See New

Orleans Pub. Serv. (NOPSI) v. New Orleans, 491 U.S. 350 (1989).

Here, the argument made for abstention by appellants is precisely the argument rejected by the Court in NOPSI. In NOPSI the appellees argued the district court properly abstained, where a Louisiana Court action was asserted to be part of a State entities ongoing ratemaking proceedings. 491 U.S. at 368. The Court rejected the argument "[s]ince the State-court review [was] not an extension of the legislative process." 491 U.S. at 372. In reaching its decision, the Court explained:

> Although our concern for comity and federalism has led us to expand the protection of Younger beyond state criminal prosecutions, to civil enforcement proceedings involving certain orders that are uniquely in furtherance of the State court's ability to perform their judicial function, it has never been suggested that Younger requires abstention in deference to a state judicial

> proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States. Colorado River Water Conservation District v. United States, 424 U.S. [800], at 817 [1976].

[491 U.S. at 367-68, emphasis added; citations partially omitted].

The Court further explained:

> It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purposes preempt, a future or,... even a pending State court action. But there is no doctrine that the availability or even the pendency of State judicial proceedings excludes the federal courts.

491 U.S. at 373.

Abstention is, moreover, has consistently been rejected as appropriate where there are, as here, federal civil rights claims and the mere assertion of a comity interest in a State forum, qua forum. As stated by the Court in Zwickler

v. Koota, 389 U.S. 241, 251-52 (1967).

> In Turner v. City of Memphis, 369 U.S. 350, 7 L. ed. 2d 762, 82 S. Ct. 805 (per curiam), we vacated an abstention order which had been granted on the sole ground that a declaratory judgment action ought to have been brought in the state court before the federal court was called upon to confer the constitutionality of a statute alleged to be violative of the Fourteenth Amendment. In McNeese v. Board of Education, 373 U.S. 668, 10 L. ed. 2d 622, 83 S. Ct. 1433, we again emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim. After examining the purposes of the Civil Rights Act, under which that action was brought, we concluded that "[w]e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." 373 U.S. at 672, 10 L. ed 2d at 625. For the "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law." England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415-416, 11 L. ed. 2d 440, 444, 445, 84 S. Ct. 461.

See also, Montana v. United States, 440 U.S. 147, 163 (1979) ("As we held in

England, abstention doctrine may not serve as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions.").

2. The Potential Impact Of Delay On the Right To Vote Precluded Abstention

While the State has an interest in reapportioning its Congressional seats; see e.g., Scott v. Germano, 381 U.S. 407 (1965); Bianchi v. Griffing, 393 F.2d 457 (2d Cir. 1968); Members of the California Democratic, et al. v. Eu, Slip. Op., Civ. No. 91-3383 FMS (D. Cal. March 3, 1992) (three judge court) (2-1 decision); that interest becomes subordinate to the countervailing federal interests of voting rights plaintiffs when the State has so delayed asserting its interests as to potentially impair plaintiffs' rights;

Harman v. Forssenius, 380 U.S. 528 (1965); Badham v. U.S. Dist. Ct. For N. Dist. of Cal., 721 F.2d 1170 (9th Cir. 1983); Edwards v. Sammons, 437 F.2d 1240 (5th Cir. 1971); Emison v. Growe, 782 F. Supp. 427, 431-434 (D. Minn. 1992) (three judge court), stayed, in part, by order of Justice Blackmun (March 11, 1992), jurisdiction noted, 60 U.S.L.W. 3669 (March 31, 1992); Cavanagh v. Brock, 577 F. Supp. 176, 180 n.4 (E.D.N.C. 1983) (three judge court); Skolnick v. State Electoral Bd of Illinois, 336 F. Supp. 839, 869-871 (N.D. Ill. 1971) (three judge court). As explained by the Harman Court:

> As this Court has stressed on numerous occasions, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government." Reynolds v. Sims, 377 U.S. 533, 555, 12 L. ed. 2d 506, 523, 84 S. Ct. 1362. The right is fundamental "because preservative of

> all rights." Yick Wo v. Hopkins, 118 U.S. 556, 370, 30 L. ed. 220, 226, 6 S. Ct. 1964. In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent to referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain. Griffin v County School Board of Prince Edward County, 377 U.S. 218, 229, 12 L. ed. 2d 256, 264, 84 S. Ct. 1226; Baggett v Bullitt, 377 U.S. 360, 375-379, 12 L. ed. 2d 377, 387-389, 84 S. Ct. 1316.

380 U.S. at 537 (emphasis added); see also Badham 721 F.2d at 1172-73 ("The dangers posed by an abstention order are particularly evident in voting cases.... We... hold that before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order

will have on the plaintiff's right to vote. Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by the countervailing interest in ensuring each citizen's federal right to vote."); Edwards, 437 F.2d 1240; Emison, 782 F. Supp. at 431-434; Brock, 577 F. Supp. at 180 n.4; Skolnick, 336 F. Supp. at 869-871.

At the time the district court denied appellants' motion for abstention, the potential irreparable impact of further delay on PRLDEF plaintiffs' right to vote was immediate - only four weeks remained prior to the commencement of the candidate qualification period. E.g., Harman, 380 U.S. at 537 (no abstention two months prior to deadline for meeting statutory requirements which impact on right to

vote); Skolnick, 336 F. Supp. at 871, (restraining further proceeding in State court four to five weeks prior to due date for nominating petitions).

If petitioning was commenced based on the State's existing discriminatory congressional lines, PRLDEF plaintiffs would have been irreparably harmed. In addition, further delay in establishing constitutionally acceptable congressional districts would also have resulted in irreparable harm to Latino voters and potential Latino candidates who because of delay had no way of assessing either who to support or whether to run for office. Cf., Badham, 721 F.2d at 1173 (Delay in redistricting cases is particularly insidious. "[O]fficials may acquire advantages of incumbency that may be difficult for their opponents to overcome in future elections.").

Refusing to abstain and ordering injunctive relief to prevent the irreparable injury to the voting rights of PRLDEF plaintiffs is squarely supported by the Court's summary affirmance in Wesch v. Hunt, Slip. Op., Civ. No. 91-0787, (three judge court), (S.D. Alabama March 9, 1992) aff'd mem. sub nom. Camp v. Wesch, 60 U.S.L.W. 3768 (U.S. May 19, 1992). The United States District Court in Wesch, on March 9, 1992, adopted a statewide congressional redistricting plan for Alabama. The Alabama Legislature had passed a congressional redistricting plan prior to the rendering of the district court's decision, but that plan had not yet been precleared. Slip. Op. at 9-10, par. 22. The district court entered an order which required that its adopted plan be used for the 1992 congressional elections unless "the Alabama Legislature

duly [enacted] a redistricting plan for the conduct of congressional elections in 1992 and [had] the same precleared no later than 12:00 noon, Central Time, March 27, 1992." Thus, the district court effectively established a trigger date for the implementation of its plan that was one week before the qualifying deadline for candidates.

The district court reasoned that "at a minimum, district lines should become fixed one week prior to the April 3, 1992 qualifying date for candidates to allow both candidates and election officials the necessary time to evaluate them and choose their future conduct accordingly." Slip. Op. at p. 21, par. 46. It further reasoned that while it did not have to preclear its interim plan, "[i]n order for a legislatively-enacted congressional redistricting plan to receive the

'preclearance' from the Justice Department required by § 5 of the Voting Rights Act, 42 U.S.C. § 1973, in time for the April 3rd qualifying deadline, such plan should have been submitted to the Justice Department no later than February 3, 1992." Id. at p.7, par. 15. It further noted that it was, because of one-person, one-vote requirements, "bound by the Constitution not to permit these elections under the present districts. Slip. Op. at p.14, par. 35.

The posture of this case, at the time of the May 5, 1992 order, was analogous to the Wesch case. The deadline for the commencement to the candidate qualification process was June 9, 1992. Candidates should have at least one week prior to that date to evaluate and choose their future conduct. Here, the legislature, of course, had not even

passed a plan; consequently, it wasn't even near meeting the preclearence requirements that New York State redistricting plans are subject to.

Forcing litigation into the New York Court system would have likely resulted in extensive delay. The State court proceedings would be subject to two levels of appeal, including an intermediate level of appeal which could redetermine factual findings (N.Y.C.P.L.R. § 5501(c)) and ending with an appeal to this Court. Even after review by this Court, the plan would be subject to preclearance. 42 U.S.C. § 1973c.[2]

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[2] It is the position of the United States Department of Justice that a redistricting plan developed by a State court must be precleared. It is also consonant with the exclusive jurisdiction of the District Court of the District of Columbia to determine whether a plan is discriminatory under § 5 standards. 42 U.S.C. §§1973c and 42 U.S.C. §1973 1(b) [Section 14(b) of the Act] ("No court other than the District of Court for the District of Columbia.... shall have

Thus, the district court's refusal to abstain was entirely consistent with established precedent, considering the exigencies of the circumstances and the

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jurisdiction to issue any declaratory judgment pursuant to section 1973b or 1973c of this....title"); see also Hathorn v. Lovorn, 457 U.S. 255, 271 (1982) (Rehnquist, J., dissenting) ("Congress did not intend the State courts to play a role in the enforcement of the Act;" exclusive federal-court jurisdiction is favored, "I do not understand the Court to contend otherwise"); see also, id., 457 U.S. at 265 (court majority) (section 14(b) of the Act "governs.... declaratory judgments approving proposed changes in voting procedure") (emphasis added).

When a federal court because of exigent circumstances, fashions its own redistricting plan, it must determine that § 5 standards are met. See 1975 Sen. Rep. at 18-19. When it does so, the court is effectively sitting in the place of the Attorney General of the United States, or a District Court for the District of Columbia. This is the only exception to section 14(b) of the Act in the Act's legislative history. The New York Supreme Court has no jurisdiction to determine whether section 5 standards have been met, and thus, was requested to submit its plan to the Attorney General or a three-judge panel of the United States District Court for the District of Columbia.

potential impact on PRLDEF plaintiffs' fundamental right to vote.

The district court's decision was also consistent with the decisions of other courts, which in deciding whether to abstain based on the potential impact of delay on federal plaintiffs' voting rights, considered the length of time that State proceedings may take. See, Emison, 782 F. Supp. at 422; Brock, 577 F. Supp. at 180 n.4.

Moreover, abstention would have in practice forced PRLDEF plaintiffs to either intervene in the State litigation or forego litigating their federal rights. Such a ruling is plainly inequitable. Cf., Sullivan v. City of Pittsburgh, P.A., 811 F.2d 171, 178 n.7 (3rd Cir. 1987), cert. denied, 484 U.S. 849 (1987) ("[A] rule that permits a conclusion of identity for [abstention] purposes from the mere

possibility of permissive intervention in state proceedings allows a state litigant to dictate choice of forum for all potential intervenors based solely on a limited common interest, without regard to identity, economic control, preferred litigation strategy and ultimate litigation goals.").

Appellants' arguments that the decisions of the courts in Germano, Bianchi, Eu and Emison require abstention are also without merit. In Germano, this Court held that the district court should have abstained its proceeding after a state proceeding had been commenced, when there was approximately nine months to redistrict before the next election. See Germano, 381 U.S. 407; Skolnick, 336 F. Supp. at 371. Even then the Germano Court ordered that:

> The case [be] remanded with

> directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate; provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election of the members of the State...
>
> The District Court shall retain jurisdiction of the case and in the event a valid reapportionment plan is not timely adopted it may enter such orders as it deems appropriate, including an order for a valid reapportionment plan for the State Senate....

[381 U.S. at 409-410 (emphasis added)].

Here, by May 5, 1992, reasonable time for the State actors to adopt a reapportionment plan had already expired, and it was appropriate for the district court to proceed to adopt a valid reapportionment plan.

The court in Bianchi without addressing the immediacy of the needed reapportionment, entered an essentially

identical order to that in Germano. See, 393 F.2d at 461.

In Eu a three judge federal court in California abstained from further adjudicating plaintiffs' claims, in an opinion dated March 3, 1992. This abstention, however, was subsequent to an opinion of the California Supreme Court rendered on January 27, 1992, which had adopted a redistricting plan proposed by appointed masters, and subsequent to the preclearance of that plan by the United States Department of Justice (by letters dated February 19 and 28, 1992).

In contrast here, the State actors were nowhere near timely completion and preclearance of a redistricting plan, and a lengthy State appellant review process and a federal preclearance process awaited any determination by the State trial court.

Similarly, the decision in Emison, supra, 782 F. Supp. 427, does not argue in favor of abstention. Emison to the contrary argues against abstaining here. First, the district court in Emison never abstained. The three judge court proceeded to adjudicate plaintiffs' federal voting rights claims and the constitutionality of Minnesota's congressional and state legislative districts, after unanimously denying a motion to abstain pending the outcome of State court proceedings. 782 F. Supp. at 431, 431 & n.17. In unanimously denying the motion to abstain in August, 1991, the court reasoned that, as here, "the federal complaint contained issues relating to the Voting Rights Act, whereas the State court action... did not." Id. at 432 n.17. It further reasoned that: "In refusing to send the minority plaintiffs to state

court [it] adhered to fundamental principles governing abstention in voting rights cases." Id.

Second, while this Court vacated the Emison court's injunction of concurrent State court proceedings, this Court acted only after the State court had already adopted a state legislative redistricting, and the state legislature, given an opportunity to act, failed to enact a redistricting plan itself.[3]

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[3] In November, 1991, the State district court had issued a state legislative redistricting plan. Id. at 432-433. The State court, declared, however, that it would not implement its plan if the legislature passed a redistricting plan in January, 1992. Id. at 433.

On December 5, 1991, the federal court enjoined all further state proceedings based on its apprehension about the apparent finality of the State court proceedings at that time, and its belief that meaningful review of the federal voting rights claims asserted only in the federal proceeding, would be prevented. Id.

Third, the Emison district court, after this Court had vacated its injunction, proceeded to adjudicate the federal plaintiffs' claims and adopt maps for Minnesota's state legislative and congressional seats. On February 19, 1992, the federal court entered an order adopting a state legislative plan and a congressional plan. It further ordered that defendant Growe, the Minnesota Secretary of State, to conduct elections only in accordance with these plans. 782 F. Supp. at 448-449.

Fourth, Justice Blackmun of this

On January 9, 1992, essentially the same state legislative districting plan as was adopted by the State court, was passed by the legislature, but vetoed by the Governor. Id. On January 10, 1992, the United States Supreme Court vacated the federal court's order of December 5, 1991, lifting the injunction on the State court parties and dissolving the stay as to the State court orders. Id. at 434 n.26.

Court, refused to stay the February 19, 1992 order entered by the federal district court with respect to the Congressional plans, even though the State court entered an order stating it would release its congressional plan if the injunction was lifted. Justice Blackmun only stayed the district court's injunctive order with respect to state legislative districts, and this was only <u>after</u> the State court had already adopted a plan.[4] Thus,

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[4] The State court had issued a procedural order on March 3, 1992, indicating that it was fully prepared to release a congressional plan if the federal injunction was lifted.

On March 6, 1992, the Attorney General of the State of Minnesota filed an application for the stay of enforcement of the federal court's February 19, 1992 order.

Justice Blackmun, by order dated March 11, 1992, granted Appellant Growe's application for a stay with respect to the state legislative redistricting plan, but denied the application for a stay with respect to the congressional redistricting

Justice Blackmun's order only stayed the federal Court's order when it conflicted with the State Court's adopted legislative redistricting plan.

Here, as in Emison, no state court had adopted a congressional redistricting plan at the time of the May 5, 1992 order. The district court properly did not abstain. The resulting delay of the adoption of a plan through State court proceedings had the potential to seriously undermine the voting rights of Latino voters.[5]

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plan.

[5] Other cases cited by appellants also do not sustain their argument for abstention. In Mahoney v. Burkhardt, 299 F. Supp. 787 (D.N.J. 1969), the panel refused enjoin impending primary elections after an interim apportionment plan had been certified by the New Jersey Supreme Court. In Ince v. Rockerfeller, 290 F. Supp. 878 (S.D.N.Y. 1968), the court abstained from litigating the constitutionality of a plan that had been adopted by the New York Court of Appeals,

3. Younger And Burford Abstention Were Inapplicable

Appellants take the extraordinary and unprecedented position that PRLDEF

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primarily because the plan involved New York State Constitutional questions concerning the creation of State Assembly districts. see, id, 290 F. Supp. at 885. In Silver v. Jordan, 263 F. Supp. 627 (C.D. Cal. 1966), the court refused to dismiss plaintiffs' claims, but abstained after the Supreme Court of California had entered an order holding that the "circumstances [did] not compel overriding [the existing] constitutional plan by limiting the terms of members of the board to be elected." Id. at 629. Here, it was undisputed that the existing congressional plan cannot be maintained; nor, is there any question that elections must be held for congressional representatives in 1992. The stay entered by this court, in Voinovich, et al. v. Quilter, et al. 503 U.S. ____ (1992), is irrelevant to the question presented here. No issue was presented in Quilter concerning a conflict between federal and state court jurisdiction. see Voinovich, 60 U.S.L.W. 3809, prob. juris. noted. June 2, 1992. Rather, the primary issues concerned whether reapportionment officials had to demonstrate a §2 violation, in a non-section 5 jurisdiction, before, they could create majority-minority districts. The district court held they did. This Court stayed that decision.

plaintiffs may be divested from litigating their civil and voting rights claims in federal court, under Younger v. Harris, 401 U.S. 37 (1971), merely, because appellants have filed a related action in State court. This Court has never gone so far as to require abstention by a federal court, where non-parties to a State action who have no identify of interests with State court parties, as PRLDEF plaintiffs are here, would be divested of their chosen federal forum. Sullivan, 811 F.2d at 178 n.71. This Court has held precisely to the contrary. See Doran v. Salem Inn, 422 U.S. 922 (1975); Sullivan supra, 811 F.2d at 176-178.[6]

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[6] The Appellants now assert to the first time on appeal that abstention was required under Colorado River Water Conversation Dist. v. United States, 424 U.S. 800 (1976). First, as in Younger abstention, Colorado River abstention requires an identity of parties. see Alliance of America Insurers v. Cuomo, 854

F. 2d 591, 603 (2d Cir. 1988). Second, the "exceptional circumstances" justifying abstention under Colorado River were not here. These circumstances are: (1) the convenience or inconvenience of the forum; (2) whether piecemeal litigation can be avoided; (3) the order in which jurisdiction was obtained; (4) the source of law for decision; (5) whether the State court can adequately protect the rights of the party seeking jurisdiction, and (6) the court first asserting jurisdiction an in rem action. Cuomo, 854 F. 2d. at 602-603. First, the state court is no more convenient than the federal court. Second, piecemeal litigation was properly avoided by the federal court's May 5, 1992, order refusing to abstain and enjoining the state action. Third, jurisdiction was obtained simultaneously by federal and state courts. Fourth, federal law is the source of law for decisions. Fifth, only the federal court could craft a plan in exigent circumstances without preclearance and with direct appeal to this court; and was, thus, the only court which could adequately protect plaintiffs' rights. The delay attendant to state court proceeding would have damaged plaintiffs' voting rights. State court proceedings could have required multiple levels of appellate review and then preclearance of any adopted plan pursuant to 42 U.S.C. §1973c. Sixth, the federal court first asserted jurisdiction over the res of congressional lines by entering relief on April 7, 1992, requiring the parties to submit proposed lines for New York's

At the time of the order, only PRLDEF plaintiffs in the federal action sought to protect the rights of Latino voters not be discriminated against under federal law. Moreover, plaintiffs in the Reid State court action included a number of incumbent members of the United States House of Representatives who are electorally advantaged by delay which shortens the campaign period, while appellees herein represent the interests of disenfranchised Latino voters and potential Latino candidates who will be electorally disadvantaged by delay. See Badham, 721 F.2d at 1173.

Appellants further assertion that abstention under Burford v. Sun Oil Company, 319 U.S. 315 (1943), applied here is also without merit. As explained by

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congressional districts.

the United States Court of Appeals for the Seventh Circuit, Ryan v. State Board of Elections, 661 F.2d 1130 (7th Cir. 1981), in rejecting such an argument:

> [The pending voting rights] cases involve no state regulatory issues. In fact they involve no issues of state law whatsoever. A federal court decision would not interfere with any state problem. The only "coherent policy" surrounding the reapportionment issue is adherence to the federal constitutional requirement of "one-person, one-vote." Davis v. Mann, 377 U.S. 678, 690, 84 S.Ct. 1441, 1447, 12 L.Ed.2d 609 (1963). Burford abstention is inapplicable.

[661 F.2d at 1135-36 (citations partially omitted)]; cf., NOPSI, 491 U.S. at 360-364.

* * *

As has been demonstrated above, the federal court properly retained jurisdiction over PRLDEF plaintiffs' claims. The federal court had a clear primacy of interest in providing relief to

plaintiffs. Furthermore, the interests of comity as reflected in the various abstention doctrines did not outweigh the federal court's primacy. We, thus, turn to whether the Court properly exercised its discretion to enjoin the State court from developing a conflicting remedy for the legislature's failure to act.

B. THE STATE ACTION WAS PROPERLY ENJOINED UNDER THE AUTHORITY CONFERRED BY THE ALL WRITS ACT

1. The District Court Did Not Abuse Its Discretion By Staying The State Court Proceeding

"[F]ederal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295

(1970).

Once the Court properly exercised its discretion not to abstain, it's only recourse was to enjoin the State court proceeding to protect its jurisdiction. The situation is not unlike a dispute over the control of property. There cannot be two sets of Congressional lines any more than there can be two legal owners of the same property. When there are two court proceedings to determine the ownership of real property, the court with the greatest interest appropriately exercises its jurisdiction to enjoin the other court from proceeding. See, e.g., Penn General Casualty v. Pennsylvania ex rel. Schnader, 194 U.S. 189 (1935). The common res here are the congressional districts; there can be only one legal set of such districts.

Further, appellants concede that a federal court properly enjoins a State

court proceeding where there is "a pre-existing order adjudging the merits in a mature federal action." Jur. at 14. They also concede that liability had been established before the federal court. See, Jur. at 17 ("no one asserts that New York may employ its existing 34 congressional district lines to hold an election to fill the 31 seats now allotted to New York; everyone concedes that new lines are essential").

Thus, the district court was wholly within its authority under the All Writs Act, 28 U.S.C. § 1651, to enter an injunction to protect it ability to effectuate a remedy without interference of the State court. See cases cited in footnote 4 of Appellants' Jurisdictional Statement. Such orders may be "against non-parties to a civil rights action to vindicate the constitutional rights of

existing parties." Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 864 (2d Cir. 1988). The district court acted wholly within its appropriate discretion.

2. There Is No Statutory Prohibition In Entering Injunctive Relief Staying Pending State Court Proceedings'

Contrary to appellants' assertions the Anti-Injunction Act does not apply here. Under the Anti-Injunction Act, "[a] court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. PRLDEF plaintiffs have brought claims for the deprivation of their right to vote pursuant to 42 U.S.C. § 1983; it is black letter law that an injunction based on these claims comes within the "expressly authorized" exception of the

Anti-Injunction Act. Mitchum v. Foster, 407 U.S. 225 (1972).

Appellants cite no case, and there is no support, for the proposition that injunctions of State court proceedings in actions with § 1983 claims are statutorily prohibited. As the Solicitor General acknowledged in the submission of the United States, with respect to the Appellants' requested stay, Mitchum v. Foster holds injunctions in actions predicated on § 1983 claims are within the "expressly authorized" exception to and are not precluded by the Anti-Injunction Act.

Mitchum, while removing the statutory barrier, nevertheless, does "not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court to enjoin a state court proceeding." 407 U.S. at 243.

However, the district court acted in a manner fully consonant with these jurisprudential concerns. Principles of equity, comity and federalism all weighed in favor of the issuance of the injunction.

As demonstrated above, there was, and is, no comity interest in having federal claims adjudicated in a State forum, qua forum. Rather, there is strong precedent in favor of maintaining a federal forum here. Further, there was no State interest in having the State Court draw New York's congressional districts. The State's interest in drawing it's own congressional lines is lodged in the State legislature, subject to the approval or veto of the Governor. The State legislature had voiced no interest in having the lines drawn in state court as opposed to federal court. At the time of

the district court's order, half of the Legislature, the Senate defendants, sought a federal forum and made motions to remove the State court proceeding to federal court, and later to enjoin the State court proceedings. The appellant State Assembly along with several incumbent Democratic Congressman (Reid plaintiffs) wanted the State courts to do it. The Governor had taken no position. The Assembly could no more assert the "State's" interest than the Senate could. Thus, there was no showing that it is in the interest of the State, as represented by the full legislature and governor, in having congressional lines drawn in the State courts. Clearly, comity, a discretionary concept in any event, can be waived by a state. This distinguishes this case from others in which the State legislature as a whole raised these comity interests.

Moreover, there was many equitable and just reasons for the district court to proceed, including harm to PRLDEF plaintiffs' § 1983 rights caused by simultaneous State court proceedings. These reasons included:

1. Preventing plaintiffs from being divested their chosen forum to adjudicate their federal rights.

2. Preventing plaintiffs from being forced to adjudicate their claims under § 2 and, potentially § 5 of the Voting Rights Act, of 1965, and under the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 in State Court or lose an opportunity to assert those rights.

3. Preventing the delay attendant upon having such federal claims being adjudicated at the State trial court, three levels of appellate review, and then reviewed by the Justice Department when petitioning to qualify as a congressional candidate begins in four weeks and plaintiffs have asserted the existing congressional map discriminates against Latino voters.

4. Preventing the irreparable harm to the right to vote of Latino voters and potential Latino candidates who, because of delay, have no way of assessing either who to support or whether to run for office.

5. Preventing the irreparable harm to the right to vote of Latino voters and potential candidates, who because of two possible sets of Congressional lines, one set created by the federal court and the other created by the State court, would still have no way of assessing either who to support or whether to run for office.

6. Preventing irreparable harm to voting rights of Latino voters and potential candidates under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, who would be denied an equal opportunity to elect representatives of their choice, because they are relatively disenfranchised would be disproportionately disadvantaged by delay, while non-Latino incumbents and their supporters would be disproportionately advantaged by delay caused by creating lines through State court proceeding.

It is well-settled that the claimed deprivation of a constitutional right such

as the right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm. Reynolds v. Sims, 377 U.S. 533, 562, 565, 84 S. Ct. 1362, 1381, 1383, 12 L.Ed.2d 506 (1964); Dillard v. Crenshaw County, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); Harris v. Graddick, 593 F. Supp. 128, 135 (M.D. Ala. 1984) (The Voting Rights Act "and its history reflect a strong national mandate for the immediate removal of all impediments, intended or not, to equal participation in the election process. Thus, when [the Voting Rights Act] is violated the public as a whole suffers irreparable injury."); C. Wright and A. Miller, Federal Practice and Procedure § 2948, at 440 (1973).

CONCLUSION

For the foregoing reasons Appellees' Motion To Dismiss Appeal And To Affirm the Ruling of the Trial Court should be granted.

Dated: June 17, 1992

Respectfully submitted,

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